Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2642

Appeal MA10-195

Toronto Police Services Board

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellant, an individual injured in a motor vehicle accident, made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Toronto Police Service (the police) for access to a copy of an officer's memorandum books with respect to the motor vehicle and bus accident in which the appellant was a passenger.

The police located the responsive records and issued a decision granting partial access to the memorandum book notes for an identified officer as well as a copy of the Intergraph Computer Aided Dispatch (ICAD) report held by the police. The police cited the discretionary personal privacy exemption in section 38(b) with reference to the presumption in section 14(3)(b) to withhold the remaining information. The police also noted that some information had been removed, as it was not responsive to the request.

During mediation, the appellant confirmed that she is not pursuing access to the information severed on pages 1 and 2 of the record or the information identified as not responsive. The appellant is pursuing access to the remaining information severed from pages 4 to 7 of the record. The mediator also attempted to gain the consent of two individuals whose interests may be affected by the outcome of the appeal (affected persons), but was unsuccessful.

During the inquiry into this appeal, I sought representations from the police, the appellant and two affected persons. I received representations from the police only.

RECORD:

The record remaining at issue consists of pages 4 to 7 of the record, which consists of memorandum book notes of an identified police officer.

ISSUES:

A. Does the record contain personal information?
B. Does the discretionary exemption at section 38(b) apply to the information at issue?
C. Was the institution's exercise of discretion proper?

DISCUSSION:

A. DOES THE RECORD CONTAIN PERSONAL INFORMATION?

The section 38(b) personal privacy exemption applies only to "personal information" as defined in section 2(1) of the *Act*. That section defines "personal information" as "recorded information about an identifiable individual." Paragraphs (a) to (h) of the definition in section 2(1) describe the various types of information that qualify as personal information. The police submit that paragraphs (c), (d) and (h) are particularly relevant, which state:

> "personal information" means recorded information about an identifiable individual, including,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The record contains the statements of the bus driver and the motor vehicle driver. The bus driver's statements about the appellant have already been disclosed to her. The remaining information at issue relates solely to the motor vehicle driver and the bus driver.

Based on my review of the portions of the record remaining at issue, I find that it contains the personal information of two identifiable individuals, specifically the two drivers, within the meaning of paragraphs (c), (d) and (h) of the definition of that term in section 2(1). While the record at issue contains the personal information of the appellant which has already been disclosed to her, the personal information remaining at issue does not relate to the appellant.

I will now proceed to consider whether the remaining information at issue is exempt under section 38(b) of the *Act*.

B. WOULD DISCLOSURE OF THE PERSONAL INFORMATION BE AN UNJUSTIFIED INVASION OF PRIVACY OF ANOTHER INDIVIDUAL?

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). I find that none of these paragraphs apply in the circumstances of this appeal.

Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b).

The police submit that the presumption in section 14(3)(b) applies which states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Orders P-242 and MO-2235]. The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn [Orders MO-2213, PO-1849 and PO-2608].

Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law [Orders M-734, M-841, M-1086, PO-1819 and PO-2019].

The police submit that the personal information in the record was compiled as a result of a motor vehicle accident. I find that the personal information at issue was compiled and is identifiable as part of an investigation into a possible violation of law, namely the *Highway Traffic Act* and the *Criminal Code*. Accordingly, I find that the presumption at section 14(3)(b) applies to the personal information in the records.

The Divisional Court has stated that once a presumed unjustified invasion of personal privacy is established under section 14(3), it can only be overcome if section 14(4) or the "public interest override" at section 16 applies. [*John Doe* v. *Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. I have considered the exceptions in section 14(4) and find that the personal information remaining at issue does not fall within the ambit of this section. Moreover, the appellant has not claimed the public interest override in section 16.

As noted above, if any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). Consequently, I find that the personal information in the officer's notes qualifies for exemption under section 38(b) of the *Act*, subject to my review of the police's exercise of discretion in applying this exemption.

C. WAS THE POLICE'S EXERCISE OF DISCRETION PROPER?

The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

The police submit that in exercising its discretion to deny access to the remaining personal information under section 38(b), it considered whether the access rights of the appellant prevailed over the privacy rights of the affected persons. The police further considered the following in its exercise of discretion:

- The fact that it is a law enforcement institution which gathers and records information about unlawful activities, crime prevention activities and activities involving members of the public who require assistance and intervention of the police.
- The unique status of law enforcement institutions under the *Act*.

Based on the police's representations and the information already disclosed to the appellant, I find that the police's exercise of discretion to withhold the remaining personal information to be proper. In considering the fact that that the appellant was requesting her own personal information, the privacy rights of the affected persons as well as the historic practice of the institution in dealing with such information, I find that the police's considered relevant factors and did not consider irrelevant factors. I uphold the police's exercise of discretion in withholding the information under section 38(b).

ORDER:

I uphold the police's decision to deny access to the remaining information in the records and dismiss the appeal.

Original signed by: August 10, 2011
Stephanie Haly
Adjudicator